82-2109

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No. ———

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

AMERICO V. CORTESE, Prothonotary, Court of Common Pleas, Philadelphia County, Pennsylvania,
PB, Intervenor-Petitioner

v.

UNITED STATES OF AMERICA and JOSEPH A. DOLLARD, Special Agent, Internal Revenue Service,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

1. Would not the enforcement of a summons issued by the Internal Revenue Service, seeking the production of documents filed by Intervenor-Petitioner Attorney, pursuant to the mandatory filing requirements of Local Rule #202 of the Court of Common Pleas of Philadelphia County, compel Intervenor-Petitioner to involuntarily relinquish his Fifth Amendment privilege against self-incrimination, contrary to the doctrine of *Couch v. United States*, 409 U.S. 336 (1973), where the filing of Intervenor-Petitioner's personal papers with Americo V. Cortese, Prothonotary of the Court of Common Pleas of Philadelphia County, was mandated by Rule #202 and noncompliance would have resulted in the institution of State lawyer disciplinary proceedings against Intervenor-Petitioner, leading to his suspension from the practice of law, under circumstances where said Rule, by its very language, mandated and promised strict confidentiality with regard to the release and disclosure of said personal papers of Intervenor-Petitioner?

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Certiorari is essential to prevent grave injustice to the Petitioner, in that the Memorandum and Order of the United States District Court for the Eastern District of Pennsylvania, as affirmed *Per Curiam* by the Judgment Order of the United States Court of Appeals for the Third Circuit, would result in compelling Intervenor-Petitioner to involuntarily relinquish his Fifth Amendment privilege against self-incrimination, contrary to the doctrine of *Couch v. United States*, 409 U.S. 336 (1973).

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v.

UNITED STATES OF AMERICA and JOSEPH A. DOLLARD, Special Agent, Internal Revenue Service,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Invervenor PB, respectfully prays that a Writ of Certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit, entered in the above case on March 30, 1983, affirming the Order of the United States District Court for the Eastern District of Pennsylvania in favor of Respondent, United States of America, against Intervenor-petitioner, PB.

OPINIONS OF THE COURTS BELOW

The United States Court of Appeals for the Third Circuit entered a Per Curiam Judgment Order (Appendix B, pp. A3-A9) on March 30, 1983, affirming the Judgment, in favor of Respondent, United States of America and Joseph A. Dollard, Special Agent, Internal Revenue Service, and against Intervenor-Petitioner, PB. Said Per Curiam Opinion is printed, *infra*. (Appendix B, pp. A3-A9).

The United States District Court for the Eastern District of Pennsylvania, on Remand from the Court of Appeals for the Third Circuit, per the Honorable Louis H. Pollak, denied Intervernor-Petitioner's Motion to Quash the Internal Revenue Service Summons and to Dismiss the Complaint and granted the Government's Motion to Enforce the Internal Revenue Service Summons on October 15, 1981. Said Excerpted Opinion is printed, *infra*. (Appendix D, pp. A12-A17).

On October 8, 1980 the United States Court of Appeals issued an Opinion in *United States v. Cortese*, 614 F.2d 914 (3d Cir. 1980), reversing an Order and Opinion of the District Court, quashing the summonses and dismissing the Complaint, and remanded the case to the District Court.

The initial Memorandum and Order of the United States District Court for the Eastern District of Pennsylvania in *United States v. Cortese*, 448 F.Supp. 845 (E.D. Pa. 1978), quashing the Internal Revenue Service summonses, was entered on April 28, 1978.

JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third Circuit, affirming the judgment of the United States District Court for the Eastern District of Pennsylvania, was entered on March 30, 1983 and is printed, *infra*. (Appendix B, pp. A3-A9). The Order of the United States Court of Appeals for the Third Circuit denying Petitioner-Intervenor's Petition for Rehearing

was entered on April 29, 1983 and is printed, *infra*. (Appendix C, pp. A10-A11). The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1) and all the All Writs Statute, 28 U.S.C.A. §1651.

STATUTES INVOLVED

The statutory and Constitutional provisions involved are Local Rule #202 of the Court of Common Pleas of Philadelphia County and the Fifth Amendment to the United States Constitution. These provisions are printed, *infra*. (Appendix A, pp. A1-A2).

STATEMENT OF THE CASE

The instant case is an appeal from a *Per Curiam* Judgment Order of the United States Court of Appeals for the Third Circuit, entered March 30, 1983, affirming an Order of the United States District Court for the Eastern District of Pennsylvania, dated October 15, 1981, denying Intervenor-Petitioner's Motion to Quash Certain Internal Revenue Summonses and to Dismiss the Complaint Seeking Enforcement of said Summonses.

On April 22, 1976, a Federal Grand Jury investigating possible violations of the Federal Criminal Mail Fraud statutes was empanelled in the Eastern District of Pennsylvania. On May 28, 1976, Internal Revenue summonses were issued by plaintiff, Special Agent Joseph A. Dollard, directing defendant, Americo V. Cortese, Prothonotary of the Court of Common Pleas of Philadelphia County, to appear to testify and to produce for examination "all contingency fee agreements filed by or for the above-named individuals with the Prothonotary's Office during the years 1971 through 1975, inclusive." Those individuals whose records were summoned were Philadelphia negligence attorneys and included Intervenor-Petitioner, P.B. The summonses were issued as a result of Special Agent Dollard's interest in full scale criminal Grand Jury investigations into the activities of negli-

gence lawyers in other cities, and only after Dollard offered the project to the Office of the United States Attorney for the Eastern District of Pennsylvania for purposes of criminal investigation.

Subsequently, on December 22, 1976, Special Agent Dollard filed the instant Complaint for enforcement of the Internal Revenue Service summonses as a result of the Prothonotary's failure to produce the requested documents. The United States sought, in the subject Complaint, to compel the Prothonotary to produce all of the records filed by each of the attorneys in question, pursuant to a former local rule of the Court of Common Pleas of Philadelphia County, designated Local Rule #202(e) and (f), hereinafter referred to as "Local Rule #202," "Rule 202" or "202."

Local Rule #202 required all attorneys practicing before the Philadelphia Courts to file copies of contingent fee agreements and statements of distribution (closing statements) with the Prothonotary. Said Local Rule further provided that *all such contingent fee agreements and all such closing statements were to be impounded*, subject only to certain limited inspection as specified and agreed upon.[1] Upon consideration of the Complaint and the exhibits attached thereto, the District Court entered an Order to Show Cause, dated December 23, 1976, requiring the defendant to appear for a hearing on January 6, 1977. On January 6, 1977, defendant filed a "Statement of Defendant," representing that defend-

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1. Local Rule 202 provides in pertinent part:
"(f) . . .
The Prothonotary shall assign to each agreement a number and shall make a record thereof in a separate docket. The Prothonotary shall record in the same docket the closing statement above referred to. *The copy of the agreement, the copy of the closing statement and the docket shall be impounded subject to inspection only by order of the Court, by the client or by the Disciplinary Board of the Supreme Court of Pennsylvania.*" (Emphasis Added).

ant was prepared to produce the documents which were the subject of the various summonses issued by the Internal Revenue Service. However, defendant requested that the District Court "afford the opportunity to any interested attorney whose records are here sought to present whatever motions or objections he might have to the enforcement of the subject Summonses before this Court."

On January 6, 1977, Intervenor-Petitioner, PB, along with other Intervenor Attorneys, petitioned for leave to intervene in the proceeding, pursuant to Rule #24 of the Federal Rules of Civil Procedure. Said Petition to Intervene was granted by the District Court on January 6, 1977. On January 28, 1977, said Intervenor-Attorneys filed a Motion to Dismiss Complaint and to Quash Summonses and Grand Jury Subpoena. In said Motion to Dismiss, Intervenors asserted, *inter alia*, that the documents which were the subject of the Internal Revenue Service summonses were their property and that defendant, Americo V. Cortese, Prothonotary of the Court of Common Pleas, who had possession of said documents, was acting merely as their agent and custodian of their private and personal records, that each contingent fee agreement and each statement of distribution filed with the Prothonotary contained privileged information which fell within the attorney-client privilege, that the production of such documents would violate Intervenors' rights against self-incrimination, that Intervenors' had filed the contingency fee agreements and statements of distribution summoned in this case with the Prothonotary with full expectation of privacy and confidentiality and with the understanding and implied agreement (and in some instances express agreement) that such records would be strictly maintained in a confidential status as provided by Court Rules.

The District Court, sitting without a jury, held numerous hearings and *in camera* sessions throughout 1977, inquiring into the motives of the Internal Revenue

Service in conducting these investigations directed solely against negligence attorneys. Honorable I. Raymond Kremer, a Judge of the Court of Common Pleas of Philadelphia County, testified as to the promised confidentiality and joint possession of the documents required to be filed under Rule #202 and to the threat of suspension from the practice of law of any attorney who failed to comply with the filing requirements of said Rule #202. Thereafter, the District Court, in a Memorandum and Order dated April 28, 1978, granted Intervenors' Motion to Dismiss the Complaint and denied enforcement of the Internal Revenue Service summonses. *United States v. Cortese*, 448 F.Supp. 845 (E.D. Pa. 1978). The United States subsequently appealed the District Court's dismissal of its Complaint to the United States Court of Appeals for the Third Circuit. On October 8, 1980, the United States Court of Appeals for the Third Circuit, in *United States v. Cortese*, 614 F.2d 914 (3d Cir. 1980), reversed the decision of the District Court, but noted:

> ". . . [i]ntervenors have also raised numerous constitutional arguments against enforcement of the summonses which were considered but not decided by the District Court. Because of our result, we need not consider these arguments, and believe they are best left to the District Court in the first instance." *Id.* at 922, n. 14.

Thus, the Court did not address or decide the Fifth Amendment issue, although it was explicitly raised.

On remand, the United States District Court for the Eastern District of Pennsylvania, per the Honorable Louis H. Pollak, denied Intervenors' Motion to Quash the Summonses and to Dismiss the Complaint and granted the Government's Motion to Enforce the Internal Revenue Service Summonses. The District Court found that the IRS and Agent Dollard did not share the improper motive of the confidential informant and re-

jected the Intervenors' assertion of institutional bad faith. The Court also rejected Intervenors' claim that the enforcement of the summonses would violate their Fifth Amendment privilege against self-incrimination, holding that the personal records of Intervenors, turned over to the Government (the Prothonotary of the Court of Common Pleas of Philadelphia County) by compulsion, had become public records.[2]

On March 30, 1983, the United States Court of Appeals for the Third Circuit affirmed the judgment of the District Court as to the enforceability of the summons with regard to Intervenor PB, and vacated said judgment with regard to the enforcement of the summonses as to all other Intervenors. (Appendix B, pp. A3-A9). The Court also stated:

> "PB has argued that enforcement of the subpoenas would violate various statutory and constitutional requirements. We have reviewed these contentions and find them to be without merit." (Appendix B, pp. A3-A9).

On April 29, 1983 the United States Court of Appeals for the Third Circuit entered an Order denying Intervenor PB's Petition for Rehearing. (Appendix C, pp. A10-A11).

The issue presented by the instant Petition concerns Petitioner's involuntary relinquishment of his Fifth Amendment Constitutional privilege, by turning over his personal papers, pursuant to a local rule of Court, under compulsion and with a legitimate expectation of privacy and confidentiality with regard to such

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2. The Court came to the conclusion that the personal records of Intervenor PB, relinquished to the Prothonotary, had become public records despite an express provision embodied in Rule #202, which guaranteed that personal filings would be impounded and kept strictly confidential, and despite Petitioner's legitimate expectation of privacy founded upon the Rule's promise of confidentiality.

papers, in contravention of this Court's espoused doctrine as articulated in *Couch v. United States*, 409 U.S. 336 (1973).

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

Certiorari is essential to prevent grave injustice to the Petitioner, in that the Memorandum and Order of the United States District Court for the Eastern District of Pennsylvania, as affirmed *Per Curiam* by the Judgment Order of the United States Court of Appeals for the Third Circuit, mandates that Intervenor-Petitioner involuntarily and under compulsion relinquish his Fifth Amendment constitutional privilege against self-incrimination, in contravention of the doctrine espoused by this Court in *Couch v. United States, supra.*

The enforcement of the Internal Revenue summonses in the instant case would violate Petitioner's Fifth Amendment privilege against self-incrimination. The Fifth Amendment provides, in pertinent part, that no person "shall be compelled in any criminal case to be a witness against himself." It has long been established, of course, that the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects, as well as compelled oral testimony. *See Bellis v. United States*, 417 U.S. 85 (1974); *Boyd v. United States*, 116 U.S. 616 (1886).

Although generally the Fifth Amendment is concerned with the compulsion of a citizen to testify against himself, there are instances in which the extraction of information from a third party would similarly violate an individual's Constitutional privilege against self-incrimination.

This issue was analyzed in detail in *Couch v. United States, supra.* The question in *Couch* was whether the taxpayer could invoke her Fifth Amendment privilege

against compulsory self-incrimination to prevent the production of her business and tax records in the possession of her accountant. Although the Court held that the production of the documents would not violate that petitioner's right against self-incrimination, it did so only after finding that the petitioner had "no reasonable expectation of privacy" concerning the documents that had been turned over to her accountant and that said petitioner did not turn over the documents as a result of government compulsion.

> This Court noted, however, that:
> " . . . the criteria for Fifth Amendment immunity remains not the ownership of property but the physical or moral compulsion exerted." (*Id.* at 336).

This Court has recognized that both the Fourth and Fifth Amendment guarantees of the United States Constitution could appropriately be asserted, even when the person asserting the privilege is out of actual physical possession and custody of the testimonial documents in question, where there exists a "legitimate expectation of privacy and . . . government compulsion" in the relinquishment of possession in the first instance.[3]

The precise contours of what constitutes "government compulsion" have never been specifically articulated by this Court. In the instant matter, the personal documents that were filed by Petitioner were filed with the Prothonotary because of governmental compulsion, a mandatory Local Rule of the Court of Common Pleas of Philadelphia County. Moreover, Petitioner, along with all other negligence attorneys, was faced with the threat of suspension from the practice of law or other lawyer disciplinary proceedings if the filings were not in fact made pursuant to the Rule. Thus, as Justice Brennan stated in his Concurring Opinion in *Couch*:

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3. This principle was restated by this Court in *Fisher v. United States*, 425 U.S. 391, 401, n.6 (1976).

> "The privilege is available to one who turns records over to a third person for custodial safekeeping rather than disclosure of the information . . . or [. . .] to one who turns records over to a third person at the inducement of the Government . . . ." (*Id.* at 337).

Certainly, the threat of disciplinary proceedings or disbarment from the practice of law constitutes not only inducement on the part of the Government, but compulsion. As such, Petitioner's original relinquishment of the documents at issue here falls squarely within the area of government compulsion noted in *Couch*.

Moreover, the *Couch* doctrine also recognizes the extension of the Fifth Amendment privilege to documents or personal effects which have been turned over to a third party with a "legitimate expectation of privacy . . . ", *Id.* at 336. This Court has long recognized that one of the several purposes preserved by the Consitutional privilege against compelled testimonial self-incrimination is that of protecting personal privacy. *See, e.g., Fisher v. United States,* 425 U.S. 391, 399 (1976); *Bellis v. United States,* 417 U.S. 85, 91-97 (1974); *Murphy v. Waterfront Commission,* 378 U.S. 352, 355 (1964).

Local Rule 202(f) provided, in pertinent part:

> "The Prothonotary shall assign to each agreement a number and shall make a record thereof in a separate docket. The Prothonotary shall record in the same docket the closing statement above referred to. *The copy of the agreement, the copy of the closing statement and the docket shall be impounded subject to inspection only by Order of the Court, by the client, or by the Disciplinary Board of the Supreme Court of Pennsylvania.*" (Emphasis Added).

Thus, the Court of Common Pleas of Philadelphia County unambiguously specified that 202 filings were

private documents to be impounded by the Prothonotary open to inspection only by Order of the Court, the client, or the Disciplinary Board of the Supreme Court of Pennsylvania. In relinquishing the personal documents and effects to the Prothonotary, Petitioner, and all other members of the Bar of Philadelphia County who complied with the mandatory provisions of Local Rule #202, had a legitimate expectation of privacy in so doing because of the express promise of confidentiality embodied in Rule #202 (f). Since the documents that were filed have been returned to numerous attorneys by the Prothonotary, it is clear that the Prothonotary was only holding such documents as a custodian, and that custody and control of these documents still remained with Intervenor, PB. The promised confidentiality of the personal papers and documents filed pursuant to the now repealed Rule #202, combined with the interpretation and administration of that provision by the Prothonotary of the Philadelphia Common Pleas Court as to their custodial possession of the same and the mandatory and compulsory nature of the Rule itself, places these personal documents of Intervenor into a classification of constitutionally privileged documents which may not be reached by the instant Internal Revenue Service summons.

This Court has never articulated the contours of what constitutes a legitimate expectation of privacy and the threat of governmental compulsion, which combine and provide Fifth Amendment protection to documents within the possession of third parties under the *Couch* decision. The ramifications of such a decision will be far reaching and the time for the Court to address them is now. The need for such definition is demonstrated by the recent case of *John Doe, Richard Roe and Paul Poe v. Selective Service System, Major General Thomas K. Turnage, Director, United States Department of Education, Terrel H. Bell, Secretary*, Memorandum Order 3-83 Civ. 100, June 16, 1983, United States District Court,

District of Minnesota, 3rd Division, where the District Court determined that the Government could not, pursuant to §1113 of the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 748 (1982), compel students seeking financial aid and assistance to reveal whether or not they had violated the law by not registering for the draft. Thus, the instant case is not an isolated instance whereby an individual is forced by government compulsion to reveal certain information, which is then turned over to another branch of the Government in an attempt to incriminate him. Moreover, if this Court does not address the issues before it in this Petition, the Government can continue to require the production of documents and personal papers under the cloak and promise of confidentiality, and then turn said documents and personal papers over to another branch of the Government in order to incriminate the individual who has, under compulsion, disgorged his private papers.

Accordingly, it is respectfully requested that this Court grant the within Petition for Certiorari in order to fully articulate the contours of its own decision in *Couch v. United States* and to uphold Petitioner's Fifth Amendment privilege against self-incrimination, which would be violated by the enforcement of the instant Internal Revenue Service summons.

CONCLUSION

The decision below, affirming the enforcement of an Internal Revenue Service summons with regard to documents that were relinquished to the Prothonotary of the Court of Common Pleas of Philadelphia County, under governmental compulsion and with a legitimate expectation that such records would be kept strictly confidential, by Intervenor, PB, results in the involuntary relinquishment of Petitioner's Fifth Amendment Constitutional privilege against self-incrimination, in contravention of the doctrine espoused by this Court in *Couch v. United States*, 409 U.S. 336 (1973). Accordingly, Certiorari should be granted, and the decision below should be reversed.

Respectfully submitted,

Robert C. Daniels
Robert J. Mongeluzzi

DANIELS, GOLDEN & SALTZ, P.C.
Counsel for Intervenor-Petitioner, PB

APPENDIX

APPENDIX A

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

LOCAL RULE 202 OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY PROVIDES IN PERTINENT PART:

(d) Every attorney effecting the recovery of damages for personal injuries, whether by settlement or through litigation, shall forthwith fill out, in duplicate, a statement showing in reasonable detail the disposition of the amount received. One such copy shall be delivered to the client, and the other shall be preserved by the attorney for two years following such settlement, subject to inspection by the client, by the court, and by the Disciplinary Board of the Supreme Court of Pennsylvania, its staff and employees. Such statements accumulated by an attorney ceasing to practice may be turned over to the then chairman of such Board.

(f) Every attorney who enters into an agreement with a client, with reference to legal representation for damages for death or personal injuries sustained either at common law or under the provisions of the Workmen's Compensation Act, or for damages in land condemnation proceedings, under the terms of which

agreement the attorneys compensation is wholly or partly on a contingent basis, shall file with the Prothonotary:

(1) Within 20 days of the date of its execution, an executed copy of the agreement; and

(2) Within 20 days of the final disposition of the case, a statement showing in reasonable detail the disposition of the amount received.

The Prothonotary shall assign to each agreement a number and shall make a record thereof in a separate docket. The Prothonotary shall record in the same docket the closing statement above referred to. The copy of the agreement, the copy of the closing statement and the docket shall be impounded subject to inspection only by Order of the Court, by the client or by the Disciplinary Board of the Supreme Court of Pennsylvania.

APPENDIX B

United States Court of Appeals
FOR THE THIRD CIRCUIT

No. 82-1040

UNITED STATES OF AMERICA and JOSEPH A. DOLLARD,
Special Agent, Internal Revenue Service
v.
CORTESE, AMERICO V., Prothonotary,
Court of Common Pleas, Phila., County
PB, JB, JJD, LK, SK, MK, SLL, ML-1, ML-2,
(Intervenor Defendant)
PB, JB, JJD, LK, SK, MK, SLL, ML-1, ML-2,
Intervenors,
Appellants

(D. C. Civil No. 76-3941)
On Appeal from the United States District Court
For the Eastern District of Pennsylvania

Present: SEITZ, *Chief Judge,* ADAMS and GARTH,* *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel January 24, 1983

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed October 16, 1981 be, and the same is hereby affirmed insofar as it enforces the summons of

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*LEONARD I. GARTH, Circuit Judge, did not participate in the decision of this case because of illness.

records filed by PB and vacated insofar as it enforces summonses of the records filed by other intervenors. The cause is remanded to the said District Court with the direction that the District Court dismiss without prejudice the October 16, 1981 Judgment only insofar as it enforces summonses of the records filed by the other intervenors.

ATTEST:

Clerk

March 30, 1983

United States Court of Appeals
FOR THE THIRD CIRCUIT

No. 82-1040

UNITED STATES OF AMERICA and JOSEPH A. DOLLARD,
Special Agent of the Internal Revenue Service,
Plaintiffs-Appellees

v.

AMERICO V. CORTESE, Prothonotary,
Court of Common Pleas, Philadelphia, Pennsylvania
Defendant-Appellant

v.

PB, JB, JJD, LK, SK, MK, SLL, ML-1, ML-2,
Intervenor Appellants

On Appeal from the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil No. 76-3941)

(DISTRICT JUDGE: HONORABLE LOUIS H. POLLAK)

Before: SEITZ, *Chief Judge*,
ADAMS and GARTH, *Circuit Judges*

Argued January 24, 1983
(Filed March 30, 1983)

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PER CURIAM.

Nine intervenor-appellants appeal an order of the district court granting the government's motion to enforce certain IRS summonses and denying the intervenors' motion to quash the summonses and dismiss the complaint. This court has jurisdiction under 28 U.S.C. §1291 (1976). The background of this case is set forth in a prior appeal. *United States v. Cortese*, 614 F.2d 914 (3d Cir. 1980).

After the district court entered the order now appealed, the intervenors did not obtain a stay. The government, thereupon, contacted the Prothonotary to obtain the documents subject to the summonses. The Prothonotary delivered all of the summonsed documents that it was able to locate. These documents included some documents filed by each of the intervenors. The Prothonotary was unable to locate some of the documents filed by four of the intervenors and there is apparently no realistic possibility that he will ever be able to locate these documents. In addition, many of the documents filed by PB had been returned to him pursuant to an order of the Philadelphia Court of Common Pleas.

The government argues that the case is moot insofar as the district court's order enforces summonses directed at the records of intervenors other than PB because, to the extent feasible, the Prothonotary has complied with the district court's order as to these intervenors.

This court sitting en banc has adopted the rule that "a case is not moot if there is a reasonable likelihood that the parties or those in privity with them will be involved in a suit on the same issues in the future." *Klein v. Califano*, 586 F.2d 250, 256 (3d Cir. 1978), quoting *American Bible Society v. Blount*, 586 F.2d 250 (3d Cir. 1971). In our view, the possibility that the intervenors other than PB will be involved in future litigation of the issues raised in this appeal is so remote and speculative that the reasonable likelihood test is not satisfied. We therefore hold this case is moot as to the district court's order insofar as it enforces the summonses against intervenors other than PB.

We are aware that this disposition may to some extent be inconsistent with a decision by a panel of this court in *United States v. Friedman*, 532 F.2d 928 (3d Cir. 1976). *But see Vesco v. Securities and Exchange Commission*, 462 F.2d 1350 (3d Cir. 1972). However, we are bound by the subsequent en banc decision in *Klein, supra*.

The government maintains that the case is not moot insofar as the district court's order enforces the summons directed at PB's records. We agree.

Although the records filed by PB are no longer in the possession of the Prothonotary, the government asserts that it is contemplating contempt proceedings against the Prothonotary to gain the return of these documents. It argues that as a result, the validity of the district court's order pertaining to these records is not moot.

In our view, if there is a reasonable likelihood of such proceedings, the enforceability of this portion of the district court's order is not moot because the issue is live and the parties have a legally cognizable interest in the outcome. *See Powell v. McCormack*, 395 U.S. 486 (1968) (case moot if issues no longer live or parties lack a legally cognizable interest in the result). We believe that the reasonable likelihood test is satisfied by the government's contemplation of contempt proceedings. We therefore conclude that this portion of the district court's order is not moot. In so concluding, we of course express no opinion on the merits of any contempt proceeding.

We recognize that it is possible to argue that the *Klein* reasonable likelihood test should not be applied to determine whether this appeal is moot as to PB. Unlike the instant case, in *Klein* a dismissal on mootness grounds would not have affected the party's position in the possible future litigation. By contrast, in the instant case, the government could not seek PB's filings in contempt proceedings if we vacated the district court's order as moot. *See United States v. Munsingwear*, 340 U.S. 36 (1950) (in civil case on appeal from a federal court which has become moot, court's duty is to vacate the judgment below and remand with directions to dismiss).

However, if this distinction affects the level of probability of future proceedings required to save a case from mootness, it would reduce, rather than increase that likelihood. Since the reasonable likelihood test is satisfied in the instant case, we will save this issue for another day.

Our conclusion, that this case is in part not moot requires us to reach the merits of the order of the district

court. PB has argued that enforcement of the subpoenas would violate various statutory and constitutional requirements. We have reviewed these contentions and find them to be without merit.

The order of the district court will be affirmed insofar as it enforces the summons of records filed by PB. The order of the district court, insofar as it enforces summonses of the records filed by other intervenors, will be vacated and the case remanded with the direction that the district court dismiss without prejudice.

LEONARD I. GARTH, Circuit Judge, did not participate in the decision of this case because of illness.

To the Clerk of the Court:

Please file the foregoing per curiam opinion.

Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1040

UNITED STATES OF AMERICA and JOSEPH A. DOLLARD,
Special Agent of the Internal Revenue Service

v.

AMERICO V. CORTESE, Prothonotary, Court of
Common Pleas, Philadelphia, Pennsylvania,
(Intervenor Defendant)

v.

PB, JB, JJD, LK, SK, MK, SLL, ML-1, ML-2,
Intervenor-Appellants

(Civil No. 76-3941 — E.D.Pa.)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ADAMS, GIBBONS, HUNTER, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, *Circuit Judges*.

The petition for rehearing filed by Intervenor-Appellant, PB, in the above entitled case having been submitted to the available judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for

rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

COLLINS J. SEITZ
Chief Judge

DATED: April 29, 1983

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA and	:	CIVIL ACTION
JOSEPH A. DOLLARD, S.A., et al,	:	No. 76-3941
Plaintiffs	:	
v.	:	
AMERICO V. CORTESE, etc.,	:	
Defendant	:	

Philadelphia, Pa., October 15, 1981

BEFORE THE HONORABLE LOUIS H. POLLAK, J.

APPEARANCES:

JAMES G. SHEEHAN, ESQ.,
for the Government

ROBERT B. BODZIN, ESQ.
RICHARD P. HAAZ, ESQ.,
for the Intervenor

THE COURT: I asked you to come this afternoon if you were able to do so, though I didn't mean to impose on your time if it wasn't convenient for you. I thought I should resolve finally, since I have reached a resolution, a matter which has been pending far too long and, unfortunately, my schedule is such for the next many days that if I didn't take advantage of this period this afternoon, I wasn't really quite sure when I could get to the matter, especially when I still hoped it would be fresh in my mind.

The matter to be resolved is an application by the United States and Joseph Dollard, a special agent of the Internal Revenue Service, to enforce certain summonses issued by Mr. Dollard on behalf of the Internal Revenue Service controverting the motion to enforce and, indeed, moving to dismiss and to quash the summonses are intervenors, persons objecting to the summonses, although the summonses were not directed to them. The summonses in question were served upon Americo Cortese in his official position as prothonotary of the Court of Common Pleas of Philadelphia County. The summonses sought certain records which under then prevailing Rules of Court were required to be filed with and kept by the prothonotary. These records were contingent fee agreements in cases filed in that court and records of distribution pursuant to those agreements.

The intervenors were and are certain attorneys whose agreements and distribution statements were among those sought to be summoned by Mr. Dollard from the files of Mr. Cortese. The summonses in question originated in May of 1976. The application to enforce the summonses came some seven months later in December of 1976, following which intervention was applied for and granted. The proceedings which then commenced have carried forward for almost five years until this day.

* * *

There are certain remaining issues which I think will not take us much time to resolve. Intervenors have not asked me to do so, to my best knowledge, but I have thought that pursuant to the Court of Appeals' remand, it was probably at least appropriate and perhaps obligatory for me to review the in-camera materials which intervenors sought access to. The Court of Appeals concluded that such access was not required for the determination of the appeals. I have reviewed the in-camera materials and I am clear that Judge Fogel was right that those materials should not be turned over to intervenors.

The other issues which were tendered by intervenors before Judge Fogel and not there resolved and not resolved by the Court of Appeals are essentially three.

Intervenors contend that the summonses, enforcement of these summonses would violate the privilege against self-incrimination. That claim is, in my judgment, groundless. The summonses are not directed at the intervenors. They are directed at Mr. Cortese and what they seek are public records, not public records in the sense that all have access to them. Indeed, access is closely guarded or was closely guarded under the relevant Court Rule, but records which were required by the Court to be filed in connection with the practice of law. They, therefore, are not only not records that are in the custody of the attorney and sought from him, the attorney intervenor, they are in the Court's custody and they take on a public aspect as do many, many categories of records which are required to be filed with public agencies in our very heavily regulated society.

This cannot, of course, be analogized to that narrow category of situations in which, for example, an attorney who has temporary custody of a client's papers may assert the client's privilege against self-incrimination with respect to a summons directed to the attorney as custodian. This is quite different and is more analogous to and more emphatic, in my judgment, in being an instance in

which the privilege is totally unavailable, analogous to such a case as *Couch v. United States*, 409 U.S. 332, and prior to Couch a Second Circuit case to which I have already referred, *United States v. Silverman*, in a closely comparable situation, though there the issue arose at trial with respect to the admissibility of contingent fee agreements that had been secured from a Court, the Fifth Amendment claim was rejected, referring to 449 F.2d 1341 at 1345-6.

The claim of attorney/client privilege is just as groundless. The information with respect to fee agreements is not information supplied by a client to an attorney with any expectation of privacy. There is no client interest to be protected here at all. The materials had, as I have already noted, been given a public cast by Court Rule. Indeed, any such claim is really substantially foreclosed, in any event, by a case which bears the suggestive title of *United States v. Cortese*, 540 F.2d 640, a 1976 decision of our Court of Appeals which refused to find, as urged, that there was any federal common-law rule which would protect from compulsory production at the behest of the Internal Revenue Service a contingent fee agreement filed by a Philadelphia lawyer pursuant to the very Court Rule, Rule 202, under which the records in this case were filed.

The Cortese case and the Silverman case both also inferentially stand for the proposition that the fact that the Court Rule provides for the confidentiality of the materials filed does not protect it against the summons authority invested in the Internal Revenue Service.

Finally, the claim is made that enforcement of these summonses would trench upon the prohibition in the Internal Revenue Code against overzealous enforcement, most particularly the prohibition against repeated examination of a taxpayer. 26 USC 7605(b) provides, "No taxpayer shall be subjected to unnecessary examination or investigation and only one inspection of a taxpayer's books of account shall be made for each taxable

year, unless the taxpayer requests otherwise or unless the secretary, after investigation, notifies the taxpayer in writing an additional inspection is necessary."

Suffice it to say that this is not a summons directed at the taxpayer nor is what is sought "a taxpayer's books of account." The considerations which give rise to the statute are discussed by the Court, that is, the Supreme Court, in Powell and the legislative history picturesquely reflects the concerns by Pennsylvania's own Senator Penrose of many decades ago of protecting the taxpayer against continuous intrusion.

No such picture, of course, is presented here. The apt precedent for this case is the disposition of Hinchcliff. In *Hinchcliff v. Clark*, 371 F.2d 697 the Sixth Circuit noted, "Section 7605 of the Internal Revenue Code by its express language is applicable only to the 'taxpayer' and provides a limitation only upon inspection of 'a taxpayer's books of account.' The notice of reopening provided for is required 'after investigation.' The logical construction of this section would be that it served as no bar to IRS investigation of closed years where its investigation pertained to information or records in the possession of third persons," 371 F.2d at 700.

Having canvassed all of the issues posed by intervenors in challenge to the summonses, I conclude that the motion to quash the summonses and to dismiss the complaint should be denied and the Government's motion to enforce the summonses should be granted and an order will enter which will be as brief as these remarks were lengthy which will recite exactly that action for the reasons recited from the bench this afternoon.

I thank you all for your more than patience, for your astonishing endurance, and most of all I thank our intrepid Mr. Feuer.

We are in recess.

(Whereupon court is adjourned.)

CERTIFICATE

I, MICHAEL FEUER, C.S.R., Official Court Reporter in and for the United States District Court for the Eastern District of Pennsylvania, do hereby certify the foregoing to be a true and accurate transcript of my stenographic notes taken in the matter of UNITED STATES OF AMERICA and JOSEPH A. DOLLARD, S.A., et al. v. AMERICO CORTESE, etc., on October 15, 1981.

MICHAEL FEUER, C.S.R.
Official Court Reporter

Office-Supreme Court, U.S.
FILED
SEP 6 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-2109

In the Supreme Court of the United States

OCTOBER TERM, 1983

PB, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-2109

PB, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

In this Internal Revenue Service Summons enforcement case, petitioner seeks review of the decision below holding that the Fifth Amendment was not violated by enforcement of a summons for documents relating to him that was issued to a third party.

1. The pertinent facts may be summarized as follows. As a result of information received from a confidential informant, the Internal Revenue Service instituted an investigation into the tax liabilities of certain attorneys involved in negligence work in Philadelphia. See *United States* v. *Cortese*, 614 F.2d 914, 917 (3d Cir. 1980). As part of the investigation, an IRS special agent issued summonses to obtain the contingency fee arrangements and statements of distribution filed by these individuals with the prothonotary of

the Court of Common Pleas of Philadelphia County. Under the local rules of that court,[1] attorneys were required to file such documents with the prothonotary.

Upon refusal of the prothonotary to provide the summoned information, the government instituted this proceeding in the United States District Court for the Eastern District of Pennsylvania to compel compliance with the summonses. Nine attorneys, including the petitioner PB, intervened and moved to dismiss the complaint and quash the summonses (Pet. App. A-6). See *United States* v. *Cortese, supra*, 614 F.2d at 917. The district court initially granted their motion, but the court of appeals vacated that decision and remanded for further proceedings (Pet. App. A-3 to A-4). *United States* v. *Cortese*, 448 F. Supp. 845 (E.D. Pa. 1978), vacated, 614 F.2d 914 (3d Cir. 1980).

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[1]At the time in question, Local Rule 202 of the Court of Common Pleas of Philadelphia County, Pa. (repealed May 20, 1976), provided in pertinent part (Pet. App. A-1 and A-2):

> (f) Every attorney who enters into an agreement with a client with reference to legal representation for damages for death or personal injuries sustained either at common law or under the provisions of the Workmen's Compensation Act, or for damages in land condemnation proceedings, under the terms of which agreement the attorney's compensation is wholly or partly on a contingent basis, shall file with the Prothonotary:
>
> (1) Within 20 days of the date of its execution, an executed copy of the agreement; and
>
> (2) Within 20 days of the final disposition of the case, a statement showing in reasonable detail the disposition of the amount received.
>
> The Prothonotary shall assign to each agreement a number and shall make a record thereof in a separate docket. The Prothonotary shall record in the same docket the closing statement above referred to. The copy of the agreement, the copy of the closing statement and the docket shall be impounded subject to inspection only by Order of the Court, by the client or by the Disciplinary Board of the Supreme Court of Pennsylvania.

On remand the district court ordered enforcement of the summonses (Pet. App. A-13, A-16; R. 204a-237a),[2] finding *inter alia*, that disclosure would not violate the intervenors' Fifth Amendment rights because the summonses were directed to the prothonotary, not the intervenors, and because the records sought "were required by the Court to be filed in connection with the practice of law [and were] in the Court's custody" (Pet. App. A-14; R. 233a)[3] Although the intervenors appealed, they failed to obtain a stay. Accordingly, the prothonotary, pursuant to the government's request, delivered to the Internal Revenue Service all of the summoned documents that he was able to locate. The records relating to petitioner, however, were not turned over because they had been returned to him after issuance of the summons by order of the Court of Common Pleas of Philadelphia County (Pet. App. B A-7).

The court of appeals held that this case was moot insofar as it concerned the documents already furnished to the IRS (Pet. App. A-7). However, the court held (*id.* at A-7 to A-8) that the appeal was not moot with respect to petitioner's records because the government was contemplating contempt proceedings against the prothonotary for relinquishing possession of those documents. The court then affirmed the district court's order insofar as it ordered enforcement of the summons for petitioner's records (*id.* at A-8 to A-9).

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[2]"R." refers to the record appendix in the court of appeals.

[3]The district court also found that the investigation was conducted in good faith (R. 214a), that the summonses had been issued for a proper purpose (*id.* at 213a-214a), that the records sought were relevant (*id.* at 227a-230a), that the Internal Revenue Service was not serving as an information-gathering agency for other agencies (*id.* at 221a), that enforcement of the summonses would not violate the attorney-client privilege (*id.* at 234a-235a), and that enforcement did not constitute a second inspection within the meaning of Section 7605(b) of the Internal Revenue Code of 1954 (26 U.S.C.) (R. 235a-236a).

2. Petitioner's sole contention (Pet. 8-12) is that the decision below requiring the prothonotary to turn over petitioner's documents violates petitioner's Fifth Amendment privilege against self-incrimination and is contrary to *Couch* v. *United States*, 409 U.S. 322, 336 (1973). This argument misreads *Couch* and ignores the record in this case.

As noted, the prothonotary does not have the remainder of the summoned records and is no longer able to comply with the summons. Those records are now in petitioner's possession, and the government has not yet sought an order requiring petitioner to return the records to the prothonotary. Thus, the question whether petitioner could be compelled to return the records to the prothonotary or to surrender them to the government is not before this Court. The only issue here is whether the prothonotary was properly ordered to surrender the documents.[4]

Petitioner's argument here centers on his assertion that the summons, although issued to the prothonotary, amounted to governmental compulsion against him, because he was required to file the documents with the prothonotary. Petitioner's argument lacks merit.

The law is clear that the Fifth Amendment privilege is a purely personal privilege that prohibits compulsion against the person asserting the privilege. *Couch* v. *United States, supra; Fisher* v. *United States*, 425 U.S. 391 (1976). Thus, the privilege is generally not available when records are sought from a third party, since ownership of documents without possession is not sufficient to invoke the protection of the privilege. *Couch* v. *United States, supra; United*

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[4]As this Court held in *Couch*, "the rights and obligation of the parties became fixed when the summons was served, and the [subsequent] transfer [of the documents] did not alter them." 409 U.S. at 329 n.9.

States v. *Silvestain*, 668 F.2d 1161, 1164 (10th Cir. 1982). Moreover, records required to be kept by law are not protected by the privilege. *Shapiro* v. *United States*, 335 U.S. 1, 32, 36 (1948).

Here, the summonses were directed at the prothonotary, not at petitioner or the other intervenors; the records sought were required to be kept by law; and the court of appeals correctly determined, contrary to petitioner's contention (Pet. 11), that the prothonotary had full custody and possession of the records. *United States* v. *Cortese, supra*, 614 F.2d at 917; see also *In re Grand Jury Impaneled Jan. 21, 1975*, 541 F.2d 373, 377 (3d Cir. 1976). Thus, there was no compulsion against petitioner, and the lower courts properly held that enforcement of the summons issued to the prothonotary would not violate petitioner's Fifth Amendment rights.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1983

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[5]This Court has made clear that the Fifth Amendment privilege "applies only when the accused is compelled to make a *testimonial* communication that is incriminating." *Fisher, supra*, 425 U.S. at 408. The Court has stressed (*id.* at 401, quoting *United States* v. *Nobles*, 422 U.S. 225, 233 n.7 (1975)) that "the Fifth Amendment protects against 'compelled self-incrimination, not [the disclosure of] private information.' " Here, in seeking records from the prothonotary, the government is exerting no compulsion upon petitioner. All the compulsion in this case is directed toward the prothonotary. Thus petitioner's argument (Pet. 10-11) that enforcement of the summons would invade privacy interests is irrelevant for Fifth Amendment purposes.

DOJ-1983-09